UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-80215-CR-RYSKAMP/HOPKINS

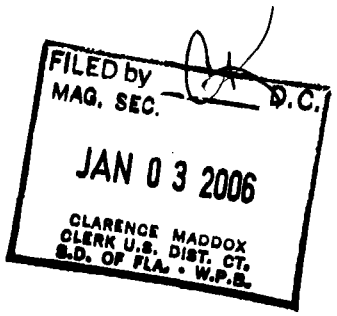
UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY C. BRESTLE
ISBELIA Q. BRESTLE,

Defendants.
_____/



ORDER CONCERNING THE GOVERNMENTS MOTION TO DISQUALIFY DEFENSE COUNSEL

THIS CAUSE is before the Court upon the Government's motion to disqualify Defense counsel. After being fully advised in the premises, the Court hereby

ORDERS, ADJUDGES, AND DECREES that David Raben, Esq, Alan Ross, Esq., and the law firm of Robbins, Tunkey, Ross, et al, are disqualified from appearing on behalf of any party in the instant case.

At the Government's request, a hearing on the potential conflict of interest was held on December 16, 2005, in the Southern District of Florida, Fort Pierce, Florida. The Government was represented by AUSA Ellen Cohen, Defendant Gary C. Brestle was represented by Alan Ross, Esq., and Defendant Isbelia Brestle was represented

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by David Raben, Esq. Both Mr. Ross and Mr. Raben are employed by the same law firm, Robbins, Tunkey, Ross et al.

At the hearing, the Government asserted four grounds for disqualification of Defense counsel: (1) it is a conflict of interest for members of the same law firm to represent two co-defendants; (2) some of the fees paid by the Defendants to counsel may be subject to forfeiture, leading to a conflict of financial interest between counsel and Defendants; (3) counsel may be called as a witness on the issue of the source of the money used to pay the fees, creating a conflict of interest between counsel and Defendants; and, (4) counsel may be investigated for criminal involvement in money laundering in violation of 18 U.S.C. § 1956 or 1957, creating a conflict of interest between counsel and Defendants.

It was determined that none of these conflicts would significantly impact the Defendants' detention hearing which was also on the calendar for December 16, 2005, should the Defendants choose to waive their right to conflict-free counsel for the purposes of the detention hearing. Following the hearing on the issue of disqualification, and after responding to a number of questions posed to them by the Court, Defendants both knowingly, intelligently and voluntarily waived their right to conflict-free counsel for the purposes of the detention hearing. Moreover, Defendants indicated their desire to waive their right to conflict-free counsel, and retain the

services of Mr. Ross and Mr. Raben throughout the criminal proceedings. At the detention hearing, the undersigned set bond for both Defendants. The Court reserved decision on the issue of disqualification. On December 27, 2005, Glenn Mitchell, Esq., entered a permanent appearance for Isbelia Brestle. At a Report re Counsel hearing for Gary Brestle, held on December 28, 2005, the Court ordered that Mr. Ross, who was representing Gary Brestle, was disqualified from any future representation of the Defendant in this matter. This written order more fully discusses the Court's decision on this matter.

DISCUSSION AND ANALYSIS

"The sixth amendment assures a criminal defendant the right to effective assistance of counsel which includes the right to counsel who is unimpaired by conflicting loyalties." *Duncan v. Alabama,* 881 F.2d 1013, 1017(11th Cir. 1989). The Eleventh Circuit went on to hold that "when an attorney labors under an actual conflict of interest, the defendant need not show prejudice in order to obtain a reversal of his conviction." *Id.* (citing *Burger v. Kemp,* 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987).

The Eleventh Circuit has held that "a criminal defendant has a presumptive

right to counsel of choice." *United States v. Ross,* 33 F.3d 1507, 1522 (11th Cir. 1994). The Eleventh Circuit has further held that, in certain circumstances, the right to conflict-free counsel may be waived by a defendant "as long as the waiver is knowingly and intelligently made." *Duncan,* 881 F.2d at 1017. In order to make a knowing and intelligent waiver, "the defendant must be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel." *Id.* (citing *Zuck v. Alabama,* 588 F.2d 436, 440 (5th Cir.), *cert. denied,* 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979)).

This right to waiver is not absolute, however. *See Wheat v. United States,* 486 U.S. 153, 159,108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *Ross,* 33 F.3d at 1523. The Supreme Court has held that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat,* 486 U.S. 153.

"[W]here a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented." *Wheat,* 486 U.S. at 162 (noting that "unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict

of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly"). The Supreme Court in *Wheat* held that the district court did not act improperly when it refused to accept a waiver of conflict-free counsel by a defendant seeking to substitute his counsel for the counsel of his co-defendants two days before trial. *See Wheat,* 486 U.S. 153.

The Eleventh Circuit has further held that "if one attorney in a firm has an actual conflict of interest, we impute that conflict to all attorneys in the firm, subjecting the entire firm to disqualification." *Ross,* 33 F.3d at 1523.

The Supreme Court in *Wheat* also held that the presumption in favor of petitioner's counsel of choice "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat,* 486 U.S. at 164; *see United States v. Register,* 182 F.3d 820, 829 (11th Cir. 1999); *Ross,* 33 F.3d at 1523. Moreover, "the law does not require direct evidence to support the court's refusal to accept" a defendant's waiver. *Register,* 182 F.3d at 830.

1) Conflict on the basis of representation of co-defendants

On December 27. 2005, Glenn Mitchell, Esq. filed a permanent appearance on

behalf of Isbelia Brestle, thus, the issue of conflict of interest on the basis of representation of co-defendant is moot.

2) Conflict of financial interest

The Government contends that the fees paid by the Defendants to counsel may be subject to forfeiture, thus leading to a conflict of financial interest between counsel and Defendants. The Government asserts that counsel was on notice that such fees may be subject to forfeiture, as counsel was aware of the ongoing investigation into the financial activities of the Defendants.

The Defense argues that there is little likelihood that the fees would be subject to forfeiture, as they were accepted on a good-faith basis for legal services rendered. Moreover, argues the Defense, no attorney would be able to accept pre-indictment fees from a Defendant if such fees were likely to be subject to forfeiture on the basis that, as an investigation was ongoing, counsel should have been alerted to the fact that such funds may have been obtained from illegal sources.

Rule 4-1.7(b) of the Rules Regulating the Florida Bar provides:

> A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another

client or to a third person or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation.

While a conflict of financial interest may be waivable by the Defendants, even if the Defendants were so offer such a waiver, this Court concludes that counsel is disqualified on other grounds, as discussed more fully below.

3) Conflict on the basis of counsel appearing as witness

The Government asserts that counsel may be called as a witness to testify as to the source of funds used to pay counsels' fees. The Government further contents that such information is not subject to attorney-client privilege.

Defense counsel argues that the information which is not subject to attorney-client privilege is only the payor and the amount of the fee. Defense contends that any further information is protected by attorney client privilege. Defense further states that Counsel will stipulate that certain checks were received from Defendants for the purposes of securing legal services.

At the hearing neither the Government nor the Defense was able to cite any cases supporting their position on the issue of attorney client privilege.

Rule 4-3.7(a) of the Rules Regulating the Florida Bar provides:

> (a)When Lawyer May Testify. A lawyer shall not act as as advocate at a trial in which the lawyer is likely to be necessary as a witness on behalf of the client except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
> (4) disqualification of the lawyer would work substantial hardship on the client.
> (b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9.

The Government cites to the third Circuit opinion in *Virgin Islands v. Zepp,* 748 F.2d 125 (3rd Cir. 1984), as persuasive authority. In *Zepp,* the Third Circuit held that "[t]he roles of an advocate and of a witness are inherently inconsistent." *Zepp,* 748 F.2d at 138. The Court further held that "[i]t might even be questionable as to whether a court could ever permit a defendant to knowingly waive her right to the effective assistance of counsel when her own lawyer will testify against her." *Id.* at 139 (citing *United States v. DeFalco,* 644 F.2d 132 (3rd Cir. 1980), *reh. denied,* 454 U.S. 1117, 102 S.Ct. 693, 70 L.Ed.2d 655 (1981)).

"The sixth amendment is designed to give the defendant a full panoply of

rights. The framers of the amendment did not propose it to assure an individual counsel a right to testify against his own client and still participate in the case." *Zepp,* 748 F.2d at 138.

The indictment in this case includes two counts of money laundering, at counts 17 and 21, as relating to two checks directed to the law firm through Mr. Raben. (DE 19). In its memorandum, the Government proffers facts which it asserts should have put counsel on notice that Defendants were involved in fraudulent activity, and that the source of funds paid to the law firm may have been the result of fraudulent activity, long before the inception of a government investigation into the activities of the Defendants. (DE 20). The Government proffered that in 2002, in the case of *Bluewater Trading Cos. v. Gary C. Brestle and Interconnect Trading Co.,* Florida 15th Judicial Circuit case number 02-017827, Mr Raben provided advice and representation to Gary Brestle in a similar fraud matter. (DE 20). The Government further proffered that Mr. Raben issued a letter on behalf of the Defendants and their companies to a forensic accounting firm retained by an alleged victim of the Defendants' fraud. (DE 20). The Government submits that a number of alleged fraud victims of the Defendants' were directed to Mr. Raben and Mr. Ross prior to the inception of the criminal investigation. (DE 20). The Government asserts that these victims put counsel on notice that a number of people were accusing the Defendants

of fraudulent activity. (DE 20).

The Government contends that counsel may properly be called as witnesses by the Government to discuss the source of the funds used to pay their fees. (DE 20). The Government further asserts that testimony concerning the origin of the fees does not implicate attorney-client privilege, and, moreover, that even if the privilege was implicated, the crime-fraud exception may apply in this case. (DE 20).

The Eleventh Circuit has held that "'[the identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-client] privilege.'" *United States v. Leventhal,* 961 F.2d 936, 940 (11th Cir. 1992) (citing *In re Grand Jury Proceedings (David R. Damore),* 689 F.2d 1351, 1352 (11th Cir. 1982)); *In re Grand Jury Proceedings (Yale Freeman),* 708 F.2d 1571, 1575 (11th Cir. 1983). The Eleventh Circuit has further held that "[m]erely because the matter which will be disclosed may incriminate the client does not make the matter privileged." *In re Grand Jury Matter No. 91-01386,* 969 F.2d 995, 998 (11th Cir. 1992) (noting that "under the crime-fraud exception to the privilege, if a client reveals to an attorney an intention to violate the law, the attorney is under an absolute duty to disclose that communication").

"The party invoking the privilege has the burden of establishing the existence of the attorney-client relationship and the confidential nature of the communication."

In re Grand Jury Proceedings (Yale Freeman), 708 F.2d at 1575. Although the issue of attorney-client privilege arose at the hearing, Defense counsel did not further address the issue in their memorandum. This Court concludes that the Government raises valid concerns concerning the potential for conflict of interest if counsel is called by the Government to testify.

This Court concludes that there is a substantial potential for a conflict of interest in that the Government may call counsel as a witness against Defendants. Moreover, such testimony may elicit information concerning counsels' possible participation in Defendants' criminal activities, an issue discussed more fully in Section 4 of this opinion.

4) Conflict on the basis of possible criminal involvement by counsel

At the hearing, the Government asserted that counsel may be subject to liability for money laundering pursuant to 18 U.S.C. § 1956 or 1957. As counsel would be facing possible penalty for criminal activity related to the crime for which the Defendants are charged, the Government contended that counsel has an unwaivable conflict. The Government alleges that counts 17 and 21 of the indictment charge the Defendants with money laundering pursuant to 18 U.S.C. §§ 1956(a)(1)(B)(i), 2 and

1957 as it relates to two checks written to the law firm through Mr. Raben. (DE –).

18 U.S.C. § 1956(a)(1)(B)(i) prohibits knowingly conducting a financial transaction with the proceeds of unlawful activity with the intention of concealing or disguising the nature, source, location, ownership or control of the proceeds of specified unlawful activity, carrying on or promoting illegal activity. 18 U.S.C. § 1956(a)(1)(B)(I).

18 U.S.C. § 1957 prohibits knowingly engaging in a financial transaction for criminally derived property of a value greater than $10,000 derived from specified unlawful activity. 18 U.S.C. § 1957.

Section 1957 excludes transactions "necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." 18 U.S.C. § 1957(f)(1).

At the hearing, the Government asserted that the payment of funds by the Defendants to Defense counsel may subject counsel to liability under 18 U.S.C. § 1956 or 1957. The Government asserted that, as counsel was aware of the investigation into the Defendants activities when the checks were issued to the law firm, counsel was also aware that the funds were possibly the proceeds of criminal activity. The Government offered the Court no further evidence of criminal

involvement by counsel.

As discussed above, the Eleventh Circuit in *Register,* citing *Wheat,* held that not only actual conflicts, but "serious potential for conflict can justify disqualification of a defendant's chosen attorney." *Register,* 182 F.3d at 832 (holding that the district court did not abuse its discretion when it disqualified defense counsel for conflict of interest based upon the attorney's alleged involvement in the defendant's criminal activities). The court further held that direct evidence of a conflict is not necessary for the disqualification of an attorney. *Id.* at 830.

The Second Circuit has recognized that danger exists when defense counsel may fear that a vigorous defense might reveal counsel's own criminal activities. *United States v. Cancilla,* 725 F.2d 867, 870 (2nd Cir. 1984). Although Defense counsel asserts that no such danger exists in this case, this Court disagrees.

Although the Government has not provided the evidentiary support as was provided in *Register*, where five witnesses testified as to counsel's participation in the defendant's criminal activities, given the unrebutted evidence that counsel was put on notice of the criminal activity before the checks were issued, this Court is concerned that counts 17 and 21 of the indictment may give rise to the danger that counsel may fear that a vigorous defense may reveal information against counsel's own interest. This Court concludes that a serious potential for conflict of interest

exists on this basis. Even if the Defendants were to offer a waiver of this conflict, this Court will accept no such waiver from the Defendants. Counsel is disqualified from filing a permanent appearance in this case.

DONE AND ORDERED in Chambers at West Palm Beach in the Southern District of Florida, this 30 day of December, 2005.

/s/ James M. Hopkins_____
JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

Copies to:

AUSA Ellen Cohen
Alan Ross, Esq.
David Raben, Esq.